

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:  <b>NEWBURY MANAGEMENT COMPANY dba NEWBURY LIVING and EMM ASSOCIATES, L.P.</b>  Polk County, Iowa	ADMINISTRATIVE CONSENT ORDER  NO. 2014-AQ- <b>24</b>
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TO: Newbury Management Company and EMM Associates, L.P.  
Frank Levy, President and Registered Agent  
3408 Woodland Avenue, Suite 504  
West Des Moines, Iowa 50266

**I. SUMMARY**

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Newbury Management Company dba Newbury Living (Newbury) and EMM Associates, L.P. (EMM) for the purpose of resolving the air quality violations which occurred during the renovation of the Elsie Mason Manor in Des Moines, Iowa. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:** **Relating to legal requirements:**

Tom Wuehr, Environmental Specialist  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Windsor Heights, Iowa 50324  
Phone: 515/725-9576

Kelli Book, Attorney for the DNR  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Windsor Heights, Iowa 50324  
Phone: 515/725-9572

**Payment of penalty to:**

Iowa Department of Natural Resources  
Henry A. Wallace Building  
502 East Ninth Street  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

Pursuant to the provisions of Iowa Code sections 455B.134(9) and 455B.138(1) which authorize the Director to issue any order necessary to secure

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compliance with or prevent a violation of Iowa Code chapter 455B, Division II (air quality), and the rules promulgated or permits issued pursuant to that part and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties, DNR has jurisdiction to issue this administrative consent order.

**III. STATEMENT OF FACTS**

1. Newbury is the lead developer and operator of the renovation of the Elsie Mason Manor Building (Building), a 17 story tower containing approximately 150 apartment units that provides housing for people 55 and over or people with disabilities, located at 430 Grand Avenue in Des Moines, Iowa. The Polk County Assessor's page lists EMM as the owner of the Building.

2. On January 15, 2014, while conducting an inspection at another building in the area, Tom Wuehr, DNR Air Quality environmental specialist, noted a renovation project at the Building. Mr. Wuehr conducted an inspection at the Building and spoke with Sandra Sechler, Property Manager for the Building and Raphael Yerpas, Project Foreman for the general contractor, 4Sight Construction (4Sight). Mr. Wuehr requested that the asbestos inspection report be emailed to him and was told that it would be provided. Several days later, Mr. Wuehr received a phase one study for the Building which specified that no asbestos testing had been done. Both Mr. Yerpas and the phase one study indicated that no asbestos testing had been done in the Building. It was also determined that a renovation notification had not been submitted to the DNR prior to the start of the renovation. Interstate Construction LLC was the subcontractor conducting the floor tile removal. At the time of the inspection, the project was in the early stages of renovation with only floor tile removed in the kitchens and bathrooms from a small number of apartments. Mr. Wuehr observed dry floor tile debris that was in friable condition in the second floor kitchen. The material was representative of the floor tile that was being removed in various parts of the building. There was no trained asbestos supervisor present during the floor tile removal. Mr. Wuehr collected samples of the dry floor tile material. The sample results indicated the floor tile material and the mastic contained regulated amounts of asbestos, 2% and 3% chrysotile asbestos respectively.

3. On January 21, 2014, Newbury sent a letter to Mr. Wuehr. The letter included a copy of the asbestos inspection from the Building that was conducted following Mr. Wuehr's visit. The letter also indicated that all asbestos containing material was now being properly removed.

4. On January 22, 2014, Mr. Wuehr met with Frank Levy, Newbury President, and recommended that all work stop until a complete HEPA vacuuming of all floors and a wet wiping of all horizontal surfaces was completed. Mr. Wuehr

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recommended Mr. Yerpes to stop all renovation activity until the area had been cleaned up.

5. On January 24, 2014, Mr. Wuehr returned to the sight and noted that the HEPA vacuuming was being conducted by Clearway Environmental Services. Mr. Wuehr was able to verify that the area was being cleaned up and proper full containment and decontaminations was being used.

6. On March 5, 2014, DNR issued a Notice of Violation letter to Newbury for the asbestos violations discovered during the January 2014 DNR inspection. A similar Notice of Violation letter was also issued to 4Sight Construction as the general contractor of the project.

#### IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.133 provides that the Environmental Protection Commission (Commission) shall establish rules governing the quality of air and emission standards. The Commission has adopted 567 IAC chapters 20-35 relating to air quality.

2. Iowa Code section 455B.133 provides for the Commission to establish rules governing the quality of air and emission standards. Pursuant to Iowa Code section 455B.133, 567 IAC 23.1(3) was established, which adopts by reference the federal regulations regarding asbestos removal. The United States Environmental Protection Agency has delegated to the State of Iowa the authority to implement and enforce the demolition and renovation portions of the federal National Emission Standards for Hazardous Air Pollutants (NESHAP), found at 40 CFR part 61, subpart M.

3. 40 CFR section 61.145(a) specifies that the owner or operator of a demolition or renovation activity shall thoroughly inspect a regulated facility for the presence of asbestos prior to the commencement of demolition or renovation. The DNR has no evidence that an asbestos inspection was ever completed prior to the renovation project. The above facts indicate a violation of this provision.

4. 40 CFR section 61.145(b)(1) requires written notification to be submitted to the DNR prior to beginning renovation. The specific requirements for this notification are contained in the subsection. The DNR has no evidence that a notification was ever submitted prior to the renovation project. The above facts indicate a violation of this provision.

5. 40 CFR section 61.145(c) details the procedures for asbestos emission control and states that each owner or operator to whom the provisions apply shall comply with the procedures. The facts in this case indicate noncompliance with these provisions when the renovation project occurred.

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6. 40 CFR 61.145(c)(1) provides that all regulated asbestos containing material shall be removed from a regulated facility before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal. During Mr. Wuehr's inspection he observed dry asbestos containing debris representative of the floor tile being removed in various parts of the Building. The facts in this case indicate violations of this provision.

7. 40 CFR 61.145(c)(6)(i) provides that all regulated asbestos containing material, including material that has been removed or stripped, shall be adequately wet and shall remain wet until collected and contained. During Mr. Wuehr's inspection he observed dry asbestos containing debris throughout the Building. The facts in this case indicate violations of this provision.

8. 40 CFR 61.145(c)(8) provides that effective one year after promulgation of this regulation, no regulated asbestos containing material shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. The facts in this case indicate there was not a trained supervisor on site during the renovation of the Building despite the fact regulated asbestos containing material was being disturbed by the renovation activities. The above facts indicate noncompliance with this provision.

9. 40 CFR 61.150 contains standards for asbestos waste disposal for demolition and renovation operations. Specifically, 40 CFR 61.150(a)(1)(iii) provides that all asbestos containing waste materials, while wet, shall be sealed in leak-tight containers or wrapping. Mr. Wuehr found dry regulated asbestos containing material scattered throughout the Building. The above facts indicate violations of this provision.

## V. ORDER

THEREFORE, it is hereby ordered and Newbury and EMM agree to do the following:

1. Newbury and EMM shall pay a penalty of \$3,000.00 within 30 days of the date the Director signs this administrative consent order.

## VI. PENALTY

Iowa Code section 455B.146 authorizes the assessment of civil penalties of up to \$10,000.00 per day of violation for the air quality violations involved in this matter. More serious criminal sanctions are also available pursuant to Iowa Code section 455B.146A.

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Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties through 567 IAC chapter 10. Pursuant to this rule, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with a \$3,000.00 penalty. Newbury and EMM are jointly and severally liable for the payment of the penalty. The administrative penalty assessed by this administrative consent order is determined as follows:

Economic Benefit - 567 IAC chapter 10 requires that the DNR consider the costs saved or likely to be saved by noncompliance. 567 IAC 10.2(1) states that "where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit." 567 IAC 10.2(1) further states, "reasonable estimates of economic benefit should be made where clear data are not available." Failure to follow the proper asbestos NESHAP regulations allowed Newbury and EMM to recognize an economic benefit in avoided asbestos removal procedures. However, Newbury and EMM incurred the added expenses of cleaning the area and the delay in the project and any economic benefit Newbury and EMM received was negated by the high cost of cleanup. Therefore, a minimal \$100.00 is assessed for this factor.

Gravity of the Violation – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Asbestos is known to cause cancer and is a hazardous air pollutant. Failure to inspect for asbestos and notify prior to renovation has caused possible asbestos fibers to be released into the air through the renovation. These violations threaten the integrity of the regulatory program because compliance with the asbestos regulations is required of all persons in this state. Based on the above considerations, \$2,000.00 is assessed for this factor.

Culpability – Newbury and EMM have a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that their conduct is subject to DNR's rules. EMM as the owner and Newbury as the developer and operator of the Building hired 4Sight Construction to do the renovation project. EMM and Newbury must ensure that contractors follow the asbestos NESHAP regulations. Therefore, \$900.00 is assessed for this factor.


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**VII. WAIVER OF APPEAL RIGHTS**

This administrative consent order is entered into knowingly and with the consent of Newbury and EMM. For that reason, Newbury and EMM waive the right to appeal this administrative consent order or any part thereof.

**VIII. NONCOMPLIANCE**

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.146.

  
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CHUCK GIPP, DIRECTOR  
Iowa Department of Natural Resources

Dated this 20<sup>th</sup> day of  
October, 2014.

  
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Newbury Management Company

Dated this 14<sup>th</sup> day of  
October, 2014.

  
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EMM Associates, L.P.

Dated this 14<sup>th</sup> day of  
October, 2014.

Kelli Book; Tom Wuehr; EPA; VII.C.4